

DEPARTMENT OF DEFENSE OFFICE OF THE INSPECTOR GENERAL

REPORT OF INVESTIGATION

CASE NUMBER
H04L94024201

DATE
January 27, 2005



ALLEGED MISUSE OF PUBLIC OFFICE:
DR. JAMES G. ROCHE, SECRETARY OF THE AIR FORCE

**Prepared by Directorate for Investigations of Senior Officials
Office of the Deputy Inspector General for Investigations**

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I. INTRODUCTION AND SUMMARY

We initiated the investigation to address allegations that arose after discovery of a May 2003 electronic message (email) exchange between Dr. James G. Roche, Secretary of the Air Force, and Ms. Robin Cleveland, Associate Director for National Security Programs, Office of Management and Budget (OMB). The email exchange at issue was provided by OMB to the Senate Armed Services Committee (SASC) as part of the Committee's review of the Air Force pilot project to lease modified Boeing 767 aircraft to replace the KC-135 tanker fleet.¹

The email exchange, initiated by Ms. Cleveland, asked Secretary Roche to assist her [REDACTED], in applying for an attorney position with the Northrop Grumman Corporation, where Secretary Roche formerly served as a senior executive. In response, Secretary Roche emailed a former associate at Northrop Grumman to endorse [REDACTED] job application, and so advised Ms. Cleveland by return email. Based on concerns expressed to this Office regarding the email at issue and our preliminary review of the matter, we examined allegations that Secretary Roche:

- Used his official title in recommending a private job applicant for favorable consideration in violation of DoD 5500.7-R, "Joint Ethics Regulation (JER)," Section 2635.702, "Use of public office for private gain";
- Used a Government communications system to transmit the employment recommendation in violation of the JER, Section 2-301, "Use of Federal Government Resources"; and
- Withheld the email containing the recommendation in response to a SASC records request in violation of DoD Directive 5400.4, "Provision of Information to Congress," which directs DoD components to "Make maximum information available promptly to, and cooperate fully with, Members of Congress and congressional committees and their staffs."²

Additionally, in order to respond to SASC concerns regarding a potential conflict of interest raised by the email exchange, we sought to determine whether Secretary Roche's employment recommendation for [REDACTED] improperly influenced the OMB assessment of the KC-767 tanker lease initiative. As explained further in the Scope section of this report, our investigation into that matter was limited by jurisdictional considerations.

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¹ Additional information concerning the tanker lease project is provided in the Background section of this report.

² As indicated above, the email exchange was submitted to the SASC by OMB. The Air Force, also requested to submit documentation to the SASC concerning the tanker lease project, did not include the email in its submission.

We substantiated the allegation that Secretary Roche's email to a former associate at Northrop Grumman constituted the use of public office for private gain in violation of Section 2635.702 of the JER, because the email implied Air Force sanction for the employment recommendation on behalf of [REDACTED] a person with whom Secretary Roche was affiliated in a nongovernmental capacity. Because Secretary Roche's email violated Section 2535.702(b) of the JER, it also violated Section 2-301 of the JER. That section permits personal use of Government communications only if that use does not "reflect adversely on DoD or the DoD Component." One example of a use that reflects adversely on DoD is a violation of a regulation (e.g., a violation of the JER).

We did not substantiate the allegation that the failure to include the email, which contained the employment recommendation, in the Air Force 767-tanker document submission to the SASC constituted misconduct on the part of Secretary Roche. We concluded that a staff member, acting alone, determined that the email was not responsive to the SASC request for tanker documentation. We found no evidence that Secretary Roche attempted to influence the document retrieval operation within the Air Force. Rather, we concluded he purposefully remained independent from that process to avoid an appearance of undue influence. Although we recognize that, by virtue of his position, Secretary Roche bore ultimate responsibility for actions by his staff in the matter, we concluded that his decision to remain independent did not violate any standard and should not be considered a matter of misconduct.

Finally, our limited investigative work found no evidence that Secretary Roche's employment recommendation caused Ms. Cleveland to modify her position on the 767 tanker lease project or that it otherwise impacted the OMB position on that project.

By letter dated November 16, 2004, we offered Secretary Roche an opportunity to comment on the results of our investigation. In his response dated December 3, 2004, Secretary Roche strongly disagreed with our conclusion that his email on behalf of [REDACTED] implied Government sanction and, accordingly, argued that the email was permissible under JER guidelines for personal use of Government communications systems.³

After carefully considering Secretary Roche's response, we stand by our conclusion that his email to Northrop Grumman violated provisions of the JER that address situations where an employment recommendation may constitute misuse of public office. His email indicated that it originated from his Air Force office and was transmitted over his official signature block ("Dr. James G. Roche, Secretary of the Air Force"). As such, it conveyed a degree of Air Force sanction that is prohibited by the JER for such employment recommendations.

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We provided the results of our investigation to Secretary of Defense but made no recommendation for corrective action in view of Secretary Roche's departure from DoD.

³ Secretary Roche's response to our conclusions was detailed and extensive. We recognize that any attempt to summarize risks oversimplification and omission. Accordingly, we incorporated comments by Secretary Roche throughout this report where appropriate and provided a copy of his response to the Secretary of Defense together with this report.

This report sets forth our findings and conclusions based on a preponderance of the evidence.

II. BACKGROUND

Secretary Roche assumed the office of Secretary of the Air Force on June 1, 2001. Prior to assuming that office he held several executive positions with Northrop Grumman Corporation from 1984 through 2001, including Corporate Vice President and President, Electronic Sensors and Systems Sector. Prior to joining Northrop Grumman, Secretary Roche was Staff Director of the Senate Armed Services Committee from 1983 through 1984. Secretary Roche's previous public service spanned 23 years in the U.S. Navy, from which he retired in 1983 with the rank of captain. As a naval officer, his assignments included Principal Deputy Director of the State Department's Policy Planning Staff; Senior Professional Staff Member of the Senate Select Committee on Intelligence; and Assistant Director for the Defense Department's Office of Net Assessment.

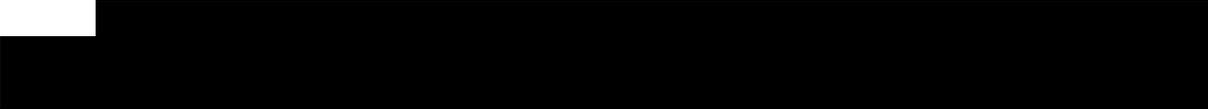
As Associate Director for National Security Programs at OMB, Ms. Cleveland had occasional professional contact with Secretary Roche on Air Force budgetary issues. According to testimony, Ms. Cleveland and Mr. Roche had been personal acquaintances since 1979 when both individuals worked in staff capacities for the Senate Intelligence Committee. They kept in touch intermittently over the years until both accepted positions in the current Administration, when they increased the frequency of their professional contact and had occasional social engagements.

Section 8159 of the DoD Appropriations Act for Fiscal Year (FY) 2002, January 10, 2002, authorized the Air Force to make payments on a multiyear pilot program for leasing not more than 100 general purpose Boeing 767 aircraft for not more than 10 years per aircraft. Section 133 of the National Defense Authorization Act for FY 2003, December 2, 2002, directed that the Secretary of the Air Force not enter into a lease for the tanker aircraft until:

- The Secretary submitted a report to the congressional Defense committees outlining his plans for implementing a pilot program, and
- Either authorization and appropriation of funds necessary to enter into the lease were provided by law, or until a new start reprogramming notification for the necessary funds was submitted.

In early 2003, the per unit price of aircraft to be leased from Boeing under the pilot program became a contentious issue, with OMB challenging the unit price being offered by Boeing that was under consideration by the Air Force. This put Secretary Roche into a somewhat adversarial professional relationship with Ms. Cleveland. On May 23, 2003, the Secretary of Defense approved the Air Force proposal to award a multiyear pilot program with Boeing for leasing 100 general purpose Boeing 767 aircraft, based on the results of a review of Boeing 767 Tanker aircraft leasing and purchasing options. After the Secretary of Defense approved the pilot program, DoD, Boeing, and OMB reached a complex financing agreement that would have allowed the Air Force to proceed with the lease initiative.

However, because of continuing concerns with the planned leasing program, the National Defense Authorization Act for FY 2004, November 24, 2003, authorized the Air Force to lease no more than 20 tanker aircraft and purchase no more than 80 tanker aircraft under the multiyear aircraft lease pilot program. On May 25, 2004, the Secretary of Defense deferred a decision on the tanker lease initiative until additional studies were completed. On October 7, 2004, House and Senate conferees reached agreement on the FY 2005 Defense authorization bill. The bill authorized a multiyear procurement for 100 new aerial refueling aircraft, prohibited the Air Force from leasing KC-767 tankers, and required that any contract for maintenance and logistical support for new tankers be competitively awarded. This effectively ended the KC-767 tanker lease initiative.

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II. SCOPE

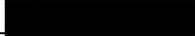
We interviewed Secretary Roche, two members of his personal staff, two attorneys from the office of DoD General Counsel, and two attorneys from the staff of the Air Force General Counsel. In addition, we obtained written responses to questions regarding the email exchange from Ms. Cleveland, as well as from two other OMB officials who were in a position to observe the impact that the email exchange may have had on Ms. Cleveland's official action with respect to the KC-767 tanker lease initiative. We also reviewed requests by the SASC for records relating to the Air Force's proposed lease of KC-767 tanker aircraft, DoD standards governing the search for responsive records, and records produced as a result of DoD's search, including records provided to the SASC and records considered "not responsive" and thus not provided to SASC.

With respect to the issue of whether Secretary Roche's action on behalf of Ms. Cleveland's brother "may have improperly influenced the OMB's assessment of the tanker lease proposal," our investigative work was necessarily limited by jurisdictional considerations. That is, we did not interview OMB personnel or have access to internal OMB documentation or communication records that may have provided information concerning the evolution of the OMB position regarding the 767 tanker lease initiative during the 2002-2003 time frame. Rather, in response to our request for assistance under Section 6(a)(3) of the Inspector General Act of 1978 (as amended), OMB agreed to a written question/answer exchange with Ms. Cleveland and two other senior OMB employees. Questions were limited to recollections regarding the email exchange between Ms. Cleveland and Secretary Roche.⁴

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⁴ Section 6(a)(3) provides that each Inspector General is authorized "to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State or local governmental agency or unit thereof."

 b7(A)IV. FINDINGS AND ANALYSIS

A. Did Secretary Roche use his public office for private gain in violation of the JER when recommending  for a position with Northrop Grumman?

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Standards**DoD 5500.7-R, “Joint Ethics Regulation (JER),” dated August 30, 1993**

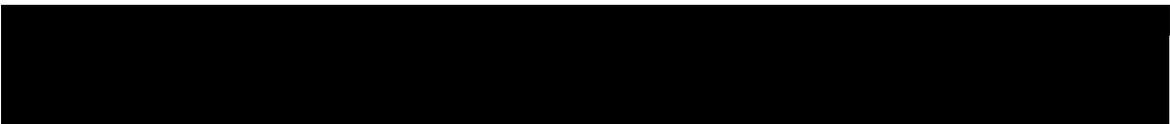
Section 2635.702, “Use of public office for private gain,” sets forth the following general standard: “An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity. . . .” This Section then enumerates, in four succeeding paragraphs, specific prohibitions that apply the general standard, noting that those specific prohibitions “are not intended to be exclusive or to limit the application of this section.”

Paragraph 2635.702(b), “Appearance of governmental sanction,” provides, in part, that “an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities.”

This paragraph of the JER specifically addresses the matter of DoD employees who provide letters of recommendation or character references in their official capacity. It permits a DoD employee to sign an employment recommendation with his official title only if: (1) the recommendation is based on “personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment,” or (2) the recommendation is for a position with the Federal Government.

The example provided under Paragraph 2635.702(b) states that a Government employee

who is asked to provide a letter of recommendation for a former subordinate on his staff may provide the recommendation using official stationery and may sign the letter using his official title. If, however, the request is for the recommendation of a personal friend with whom he has not dealt in the Government, the employee should not use official stationery or sign the letter of recommendation using his official title, unless the recommendation

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is for Federal employment. In writing the letter of recommendation for his personal friend, it may be appropriate for the employee to refer to his official position in the body of the letter.

Facts

Secretary Roche told us that during a personal dinner with Ms. Cleveland in April 2003, he learned of [REDACTED] application for an “openly advertised position at Northrop and that it was in compliance.”⁶ He recalled that when he took over Northrop Grumman's newly acquired Electronic Sensors and Systems Sector (formerly Westinghouse Electric) in 1996 he faced “a horrible compliance problem.” He thought [REDACTED] job application was an opportunity to help [REDACTED] while alerting Northrop Grumman to a candidate who possessed certain compliance-related skills that might benefit Northrop Grumman.

In her written response to us, Ms. Cleveland corroborated the genesis of Secretary Roche's involvement in [REDACTED] employment search. She recalled mentioning “that my [REDACTED] was looking for a job,” during an April 2003 dinner with Secretary Roche and that she subsequently decided to ask Secretary Roche for assistance after her [REDACTED] “reminded me that Secretary Roche had worked there [Northrop Grumman] previously.”

By email to Secretary Roche at 3:49 p.m. on Friday, May 9, 2003, from her Government (OMB) email account, Ms. Cleveland forwarded the cover letter and resume that her [REDACTED] had submitted to Northrop Grumman on April 21, 2003, in response to an advertised senior counsel position. Ms. Cleveland commented as follows in her email:

Jim - this is my [REDACTED] stuff. I would appreciate anything you can do to help with NG [Northrop Grumman]. He is an incredibly hard working, disciplined guy - worked full time, with two little kids putting himself through law school at night. Thanks much.
Robin.

At 4:20 p.m. that day (May 9, 2003), Secretary Roche sent an email from his Air Force issued Blackberry device to [REDACTED] Northrop Grumman. The “From” line of the email read “James.Roche.pentagon.af.mil.” The subject of the email was “FW: [REDACTED] Resume and Cover Letter Attached for Export/Import Compliance Attorney (DC) Position.” In the message Secretary Roche stated:

[REDACTED] I know this guy. He is good. His [REDACTED] (Robin) is in charge of defense and intel at OMB. We used to work together in the Senate staff. If [REDACTED] looks good to you, pls add my endorsement. Be well. I've let Rummy con me one more time! Army! Best to [REDACTED]. Jim.

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⁶ The position at Northrop Grumman of interest to [REDACTED] was in the Office of the General Counsel and involved matters of compliance with import/export control regulations and defense security requirements.

The foregoing message was transmitted to [REDACTED] over Secretary Roche's official title/signature block, "Dr. James G. Roche, Secretary of the Air Force."

At 5:12 p.m. that day (May 9, 2003), Secretary Roche forwarded Ms. Cleveland the email he sent to [REDACTED] described above. He added the following comments: "Be well. Smile. Give me tankers (oops, did I say that? My new deal is terrific.) :) Jim."⁷ Those comments were also transmitted over Secretary Roche's official signature block, "Dr. James G. Roche, Secretary of the Air Force."

By email dated Monday, May 12, 2003, [REDACTED] responded to Secretary Roche's endorsement of [REDACTED] as follows:

I like [REDACTED] resume. I am looking into the available job openings. The job for which he seems particularly suited . . . may have been offered to another candidate, but there are other jobs for which he should be considered. I will call [REDACTED] to set up a time for us to meet.

During his interview, [REDACTED] told us that he had a business and social relationship with Secretary Roche for 15 years and said that, based on Secretary Roche's email recommendation, "I thought I should take a look at this thing [REDACTED] resume]. Jim [Roche] thought he was a good guy and I took it simply as a recommendation to take a look at a worthwhile candidate." [REDACTED] could not recall if he had interviewed anybody else for positions in the general counsel office, but acknowledged "I know I interviewed him [REDACTED]. I liked him."

By email dated May 15, 2003, [REDACTED] advised his [REDACTED] (Robin) that he interviewed with [REDACTED] at Northrop Grumman that day, indicating that the interview "seemed to go very well." In her email response to her [REDACTED] later that day (May 15), Ms. Cleveland commented, "Great hope it works before the tanker leasing issue gets fouled up."

Sometime after he interviewed [REDACTED] recalled that Secretary Roche called him to "make sure that I didn't -- that he didn't feel like he was pressing me about [REDACTED] and I didn't feel like he was pressing me about this at all, so I said, 'Well, fine.' . . . he tried to make it plain that he was not trying to put any pressure on me about this guy." [REDACTED] stated that [REDACTED] was not selected for employment with Northrop Grumman, opining "I thought he was a good candidate, but I thought there were better candidates."

Secretary Roche testified that he did not have a personal relationship with [REDACTED] had met him once, and would "have a hard time picking [him] out in the crowd right now." Rather his interest in [REDACTED] was based on perceived similarities between the circumstances of [REDACTED] upbringing and the growing up experiences of Secretary Roche's own son, who was the same age as [REDACTED]. In that regard, Secretary Roche told us that he and Ms. Cleveland periodically exchanged information observations concerning the two men over the years.

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⁷ The colon followed by a closed parenthesis, "(:)," designates a smiley face -- ☺.

During his interview with us, Secretary Roche denied his email to ██████████ constituted a recommendation of ██████████ *per se*. He stated, "I didn't say he was a good lawyer. I can't recommend ██████████ as a lawyer because I can't judge a lawyer. Secondly, I don't say that he's a good businessman." Concerning his email to ██████████ Secretary Roche added

I knew it to be ethically okay as long as I didn't attribute qualities to the kid that I could not back up and as long as I made it clear it's not something -- don't do me any favors. This is something you need to judge. I'm just putting people together.

Additionally, Secretary Roche believed that his email recommendation did not violate the JER because it was not like "writing a letter out on Air Force official letterhead and signing it." Rather, he viewed the email as an informal personal communication that was authorized under Air Force email policy and could not reasonably be viewed as official.

Regarding the matter of his official title, Secretary Roche stated ██████████ "knows exactly who I am. If I had put down King of Siam at the bottom of the tag line he would still know I was Secretary of the Air Force." He added, "I never see that tag line at the bottom [of electronic mail sent from the Blackberry device]. It's put on by the server."

██████████ acknowledged that Secretary Roche's signature block was on the email in question, but denied he inferred that the email constituted an official communication. He testified, "I know Jim socially, and the fact that his official signature is on there made no difference to me." He considered Secretary Roche's email to be simply "a recommendation to take a look at a worthwhile candidate."

We consulted with an DoD information technology specialist who advised that the user of a Blackberry device can change the default signature appended to emails sent from the device. The specialist explained that the user can change or delete a default entry by using a feature in the Blackberry application that is available at the user level.⁸

Discussion

We concluded that Secretary Roche's email of May 9, 2003, to ██████████ constituted the use of public office for private gain in violation of the JER because the email implied Air Force sanction for the personal employment recommendation on behalf of ██████████ a person with whom Secretary Roche was affiliated in a nongovernmental capacity. Because Secretary Roche's email to ██████████ clearly indicated that it originated from his Air Force office (i.e., from "James.Roche@pentagon.af.mil") and was presented over his official signature block, we consider it analogous to the example contained in Paragraph 2635.702(b) of the JER.

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⁸ During our October 20, 2004, interview, Secretary Roche stated "what I've done is since people are raising this, I've removed Secretary of the Air Force, figuring after three years if they don't know who the hell I am the hell with it. It just says James Roche."

Although that example in the JER refers to the situation where a recommendation takes the form of a letter on official stationery and signed using an official title, we concluded that the use of a Government Blackberry with a sending address from the Air Force at the Pentagon and a signature block identifying the office held by the sender is equivalent to the letter format addressed in the JER. That is, the email as formatted conveyed an element of Air Force sanction that would not be present had Secretary Roche made the recommendation on plain paper and signed it without using his Air Force title or sent the message using his personal America Online account. In reaching that conclusion, we considered the JER stipulation in Section 2635.702 that specific prohibitions applying the general standard regarding “Use of public office for private gain” (i.e., the prohibition that included the letter illustration) were not intended to be exclusive or limiting.

While the JER permits DoD employees to refer to their official position in the body of an otherwise personal employment recommendation, such reference does not reasonably convey Government sanction. Conversely, the use of letterhead stationery, or in this case Government originated email, coupled with a signature block can be interpreted to imply Government sanction.

The two conditions that would have permitted Secretary Roche to provide an “official” recommendation on letterhead for ██████████ pursuant to the JER did not exist. That is, Secretary Roche had not dealt with ██████████ in the course of his Government employment and ██████████ was not applying for a Federal position. Accordingly, the recommendation for employment with Northrop Grumman that Secretary Roche made for ██████████ was a strictly personal endeavor that should not have carried the implication of Government sanction that was conveyed by its means of transmission, a Government email system, and sent over Secretary Roche’s signature block.

We acknowledge that Secretary Roche’s signature block was appended automatically to his Blackberry emails. However, he had the option to change or delete the signature block by changing the settings on his Blackberry. He did not do so, and therefore is responsible for the inclusion of his signature block on emails he sent from his Blackberry device. We note that Secretary Roche has since removed his title, “Secretary of the Air Force” from the automated signature on his Blackberry device.

Secretary Roche’s response

In his written response of December 3, 2004, to the foregoing conclusion, Secretary Roche did not dispute our factual findings and emphasized his understanding “that public office is a public trust and may not be used for anyone’s private gain.” However, he disagreed with our “interpretation of the regulatory provisions governing employment recommendations,” asserting “There is absolutely no chance, considering the surrounding facts and circumstances, that ██████████ could have reasonably construed my e-mail to be an official Air Force endorsement of ██████████”

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In that regard, Secretary Roche considered the email at issue “a personal exchange” that is permitted by the JER.⁹ He took exception to our conclusion that his email on behalf of ██████████ was analogous to a recommendation made on official stationery and signed using an official title -- a format which he agreed risked “being misconstrued as an agency communication.” Instead, Secretary Roche argued that his email was a strictly personal communication to a friend outside Government and that it could not be interpreted under any circumstances as indicating an official action or endorsement by the Secretary of the Air Force. He noted that his email included obviously personal comments (“Be well.” “Best to ██████████ ██████████”) and included colloquial speech and humor (“I’ve let Rummy con me one more time! Army!”) that he would never use in an official communication.

Additionally, Secretary Roche argued that our conclusion regarding his email was inconsistent with provisions in the JER that permit limited personal use of Government communications systems. In that regard, Section 2-301.a. of the JER states that Federal Government communication systems “shall be for official use and authorized purposes only.” Authorized purposes include

personal communications from the DoD employee’s usual work place that are most reasonably made while at the work place (such as checking in with spouse or minor children; scheduling doctor and auto or home repair appointments; brief internet searches; e-mailing directions to visiting relatives). . . .

Secretary Roche noted that such authorized personal email from any DoD employee would necessarily bear a Government originated (e.g., “.mil”) address, but would not reasonably be seen as official communication or conveying Government sanction. Secretary Roche further noted that many DoD employees use a computer-generated signature block that is automatically appended to any email they send -- whether official or personal. He argued, “This technique is not intended to characterize every outgoing e-mail as ‘official’, it is simply a tool for effective communication.” In short, Secretary Roche summarized, “we should not elevate form over substance to invent official sanction where none could reasonably be perceived.”

After carefully considering Secretary Roche’s response, we stand by our conclusion that his email to ██████████ violated provisions of the JER that specifically address situations where an employment recommendation may constitute misuse of public office. We make the following points in addition to our discussion above to support this conclusion:

- Because of the unique nature of an employment recommendation made by a Government official, the JER imposes restrictions designed to avoid not only overt and obvious efforts by DoD employees to exploit their official positions when making such recommendations, but also to prevent those situations meeting a lower threshold -- that is, employment recommendations “that could reasonably be construed to imply” Government sanction or endorsement. In our view, Secretary Roche’s email, bearing a Government address and signature block, met

⁹ As discussed more fully below, the JER permits limited personal use of Government email accounts when certain conditions are met.

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this lower threshold.

- [REDACTED] took immediate and positive action to act on Secretary Roche's request. He interviewed [REDACTED] 4 working days after receiving the email and, during our interview, was unable to recall any other candidates that he interviewed for the position of interest to [REDACTED]. Further, he suggested that [REDACTED] be considered for positions at the Northrop Grumman other than the one for which he applied. In our view, the official format of Secretary Roche's recommendation may have contributed to this swift reaction.
- Secretary Roche felt obligated to call [REDACTED] after sending the email to ensure that [REDACTED] did not feel pressured to take action on behalf of [REDACTED] based on the email recommendation. It is reasonable to suggest that Secretary Roche's concern in that regard may have stemmed, in part, from his recognition that an employment recommendation made by a Service Secretary using his official title to a major DoD contractor may exert influence that a strictly personal communication would not.

We recognize that DoD employees are permitted use of their Government email accounts for personal business, but that use is strictly limited by to communications "that are most reasonably made while at the work place" and that meet several criteria. Included among those criteria, as listed in Section 2-301 of the JER, are communications which "Do not put Federal Government communications systems to uses that would reflect adversely on DoD." Examples of such unauthorized personal uses include, "soliciting or selling," violations of statute or regulation," "uses that are incompatible with public service." The examples given by the JER of personal communications that are authorized (checking in with a spouse or children, scheduling doctor visits, or emailing directions to relatives) are clearly and easily distinguishable from the communication that we consider unauthorized in this case -- an employment recommendation from a DoD official, using his official title, to a DoD contractor.

B. Did Secretary Roche violate the JER by using a Government communications system to transmit the employment recommendation for [REDACTED]?

Standard

DoD 5500.7-R, "Joint Ethics Regulation (JER)"

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Section 2635.704 of the JER, "Use of Government property," paragraph (a), "Standard," states, "An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes." Government property includes telecommunications equipment and automated data processing equipment. "Authorized purposes" are those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation.

Section 2-301.a. states: "Federal Government communication systems and equipment (including Government owned telephones, facsimile machines, electronic mail, internet systems,

and commercial systems when use is paid for by the Federal Government) shall be for official use and authorized purposes only.” However, Subsection 2-301.b.(1) of the JER, allows DoD employees to make limited personal use of Federal Government resources other than personnel, including office equipment, if the following criteria are met:

- The use does not adversely affect the performance of official duties by the DoD employee or the DoD employee’s organization.
- The use is of reasonable duration and frequency, and made only during the DoD employee’s personal time, such as after duty hours or lunch periods.
- The use serves a legitimate public interest, such as enhancing the professional skills of the DoD employee.
- The use does not put Federal Government resources to uses that would reflect adversely on DoD or the DoD component (such as uses involving the violation of statute or regulation).
- The use creates no significant additional cost to DoD or the DoD component.

Facts

Regarding Secretary Roche’s use of a Government Blackberry device to transmit the electronic mail message discussed above, Secretary Roche testified, “We have the following policy. We do not want people plugging in private computers anywhere in the Air Force Headquarters. Therefore we basically tell people use your electronic mail for everything.” Secretary Roche explained his belief that electronic mail is no different than a memo pad, except that electronic mail identifies the sender.

Concerning the use of electronic media to communicate, Secretary Roche testified “I live my life electronically,” and that “friends can get me on AOL [America Online].” However, he added that “everything is channeled so I can do stuff from [the worksite], I can do things from a car, I can do things from the airport.”

Discussion

Because Secretary Roche’s email to ██████████ violated Section 2635.702 of the JER, as discussed above, it necessarily violated Section 2-301.a. of the JER. That section permits personal use of Government communications only if that use does not “reflect adversely on DoD or the DoD Component.” One example of a use that reflects adversely on DoD is a violation of a regulation (e.g., a violation of the JER).

Secretary Roche’s Response

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As set forth above, Secretary Roche disagreed with our conclusion that his email to ██████████ violated JER restrictions concerning employment recommendations. Accordingly, he

disagreed with our conclusion that the email constituted an unauthorized use of Government communications systems.

In his response of December 3, 2004, Secretary Roche noted that JER provisions applicable in this case were established before the onset of dramatic enhancements in communication alternatives made available to Government employees for conducting official business (e.g., cellular telephones, global email accounts, personal digital assistants). As a result, Secretary Roche opined that the email exchange at issue “is being evaluated within a regulatory framework that does not fully anticipate or comprehensively address this fact pattern [referring to the facts and circumstances of the email job recommendation], and thus is a matter of which reasonable minds may presently differ.” However, Secretary Roche continued,

Despite that, I remain sincere in my belief that this [email to ██████████] was a permissible, limited personal use of government communications systems to transmit a matter that could not have in any way been reasonably interpreted by its intended recipient, or anyone inadvertently receiving it, as an ‘official’ communication, judged in light of the surrounding facts and circumstances. If we find otherwise in this case, we are going to establish a government-wide standard that hamstring and exposes to risk not only senior government officials, but practically every member of government in possession of a government cellular telephone, personal computer, or personal digital assistant.

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We believe that Secretary Roche’s assertions with respect to whether his email constituted, or was perceived as, an official communication diverts focus from the fundamental JER test applicable here -- whether his recommendation “could reasonably be construed to imply” Government sanction or endorsement, not whether it was official vice personal. As described by the JER, a personal letter of recommendation could imply Government sanction if made in Government letterhead or signed using an official title. We agree with Secretary Roche that he undertook the email as a personal venture. Despite that intent, however, he chose a manner of communication that could reasonably convey some element of Government sanction.

Further, we do not agree with Secretary Roche’s suggestion that all Government employees are at risk of misusing Government communications systems if our interpretation of facts in this case *vis a vis* the JER is correct. The JER does not permit unfettered personal use of Government communications systems. Rather, it imposes strict controls over personal use -- personal communications must: (1) be of limited duration and frequency, (2) be made during the DoD employee’s personal time whenever possible, (3) serve a legitimate public interest, and (4) not involve advertising, selling, or soliciting. The JER examples suggest that personal communications over Government systems should be designed to convey short, timely personal messages to private parties (with no official DoD interests) that are “most reasonably made while at the work place.”

In authorizing the use of Government communication systems for personal business, the JER clearly suggests that DoD employees should exercise discretion and restraint when doing so.

The personal use of a Government system should be avoided when circumstances surrounding such personal use would tend to raise questions regarding its propriety.

C. Did Secretary Roche improperly withhold the email containing the recommendation in response to a SASC request for records in violation of DoD Directive 5400.4, "Provision of Information to Congress"?

Standard

DoD Directive 5400.4, "Provision of Information to Congress," dated January 30, 1978

This Directive sets forth general policy governing provision of information to Congress. Section 3, "Policy," states that it is DoD policy to make information concerning its operations and activities promptly available to both Government officials and the public, and to otherwise cooperate fully with Members of Congress and congressional committees and their staffs. Paragraph 3.1.1. requires that DoD components "Make maximum information available promptly to, and cooperate fully with, Members of Congress and congressional committees and their staffs."

Facts

In a letter dated September 11, 2003, to the Secretary of Defense, regarding Boeing Military Leases, Senator John McCain, Chairman, Senate Commerce Committee, requested among other things, "All records relating to the Boeing 767 lease proposal to or from Secretary of the Air Force, James G. Roche." The letter defined what constituted the records sought, and added, "'Records' shall also include all other records documents, data, and information of a like and similar nature not listed above."

In a letter dated September 13, 2004, to the Secretary of Defense, Senator John Warner, Chairman, SASC, Senator Carl Levin, Ranking Member, SASC, and Senator McCain, Member, SASC, wrote the SASC had been made aware by the OMB of an "extremely troubling" exchange of emails between the Secretary Roche and Ms. Cleveland concerning OMB's review of the KC-767 tanker lease. The email exchange referenced by the SASC was described in detail above. (See Section IV.A., "Facts," of this report.) At issue here, the letter noted:

In addition to our concerns about the substantive nature of this e-mail, we are troubled by the fact that the Air Force chose not to provide this document to the Committee due to the Air Force's assessment that this e-mail was 'not relevant' to the Committee's oversight of the tanker issue.

We found that a "SECAF [Secretary of the Air Force] TASKER" dated December 19, 2003, instructed nine organizations within the Air Force to respond to Senator McCain's

consolidated with submissions from the other offices. This collection was then provided to [REDACTED], Office of Air Force General Counsel. Although [REDACTED] reviewed the emails [REDACTED] identified as responsive, there was no review of those [REDACTED] deemed nonresponsive.

We asked [REDACTED] if he still considered his initial decision that the email in question was nonresponsive to be correct. He responded he still would call it nonresponsive. He explained he was looking for “that which had substance regarding the [767 tanker lease] proposal.” He added he was aware that Ms. Cleveland and Secretary Roche had a longstanding professional relationship from their service on the Senate staff and that they were also personal friends. He continued that when he observed Secretary Roche joke, it was typically a sign of friendship, and that he took Secretary Roche’s comment “Give me tankers. (oops, did I say that?)” followed by a typed “smiley face” as a joke between friends. He concluded the email was not responsive to the SASC request.

[REDACTED] testified he received records from several offices within the Air Force, including the Office of the Secretary. He testified he “had a fairly high degree of confidence that we had captured the universe of documents. And the way I say it, it was just the sheer volume was fairly consistent with my expectation.” He added that the content of the records also encouraged his belief that the records were responsive to the SASC request because, “you had the stuff in there that was not at all flattering for our Secretary, very unflattering things . . . referring to people in sort of nasty terms and phrases.” [REDACTED] reviewed the records and then produced two productions sets, one for the Air Force and one to be forwarded to the Office of the DoD General Counsel, for further review and eventual turnover to the SASC.

Discussion

We did not substantiate the allegation that the Air Force failure to include the email, which contained the employment recommendation, in the 767-tanker document submission to the SASC constituted a violation of DoD Directive 5400.4 or other misconduct on the part of Secretary Roche. We consider credible the testimony by Secretary Roche, as corroborated by [REDACTED], that Secretary Roche did not participate in the document retrieval effort that was undertaken by the Air Force in response to the SASC request. We found no evidence that Secretary Roche gave direction to those involved in the document retrieval, attempted to monitor or influence the retrieval once it was in progress, or engaged in any other effort to limit or withhold documents from the SASC with respect to the tanker lease proposal. Rather, we concluded he purposefully remained independent from that process to avoid an appearance of undue influence.

We concluded that [REDACTED] acting alone and without any influence from Secretary Roche, made a good faith decision that the May 9, 2003, email exchange between Secretary Roche and Ms. Cleveland was not responsive to the SASC request for tanker documentation. In [REDACTED] view, responsive documents were those that contained a substantive discussion of the tanker lease proposal. Although [REDACTED] opinion in that regard varied from the Committee request for “[a]ll records relating to the Boeing 767 lease

b7(C)

proposal,” we find insufficient basis to pursue [REDACTED] misinterpretation as a matter of misconduct.

b7(C)

We recognize that, by virtue of his position, Secretary Roche bore ultimate responsibility for actions by his staff in the matter. However, we concluded that his decision to remain independent did not violate any standard and should not be considered a matter of misconduct.

D. Did Secretary Roche’s employment recommendation improperly influence the OMB assessment of the KC-767 tanker lease initiative?

Standards

DoD 5500.7-R, “JER,” dated August 30, 1993

Section 2635.101 of the JER, “Basic obligation of public service,” states that employees shall not use public office for private gain. This obligation is further described in Section 2635, Subpart G of the JER, “Misuse of Position.” Section 2635.702 of Subpart G, “Use of public office for private gain” states,

An employee shall not use or permit the use of his government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself, or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

In this case, the comment, “Give me tankers,” by Secretary Roche in the email exchange at issue could be perceived as request for official action by Ms. Cleveland, in exchange for a private benefit (job recommendation) that was provided to her by Secretary Roche. If so considered, Secretary Roche would be implicated in a potential violation of Section 2635.702 of the JER on the part of Ms. Cleveland.¹¹

Additionally we examined the matter of Secretary Roche’s alleged attempt to unduly influence OMB under the JER guidelines for ethical values and ethical decision-making found in Chapter 12, Sections 5 and 6. The following pertinent guidelines are provided in Section 5, “Ethical Values:”

Integrity. Being faithful to one’s convictions is part of integrity. Following principles, acting with honor, maintaining independent judgment and performing duties with impartiality help to maintain integrity and avoid conflicts of interest and hypocrisy.

Accountability. DoD employees are required to accept responsibility for their decisions and the resulting consequences. This

¹¹ This section of the JER is codified in Section 2635.702, Code of Federal Regulations, and applicable to all Federal employees.

includes avoiding even the appearance of impropriety because appearances affect public confidence.

Section 6, “Ethical Decision-Making,” provides that all job-related decisions “should be preceded by a consideration of ethical ramifications.” Of application here, Subsection 12-601.h. notes:

There may be solutions that seem to resolve the problem and reach the goal but which are clearly unethical. Remember that short term solutions are not worth sacrificing our commitment to ethics. The long term problems of unethical solutions will not be worth the short term advantages.

Facts

Two comments in the emails originated by Secretary Roche and Ms. Cleveland are particularly relevant to the allegation that Secretary Roche’s job recommendation on behalf of ██████████ may have improperly influenced OMB to take favorable action with respect to the KC-767 tanker lease initiative:

- The comment “Give me tankers (oops, did I say that? My new deal is terrific.)” by Secretary Roche in the email to Ms. Cleveland that advised he had endorsed her ██████████ for a position at Northrop Grumman, and
- Ms. Cleveland’s comment -- “Great hope it works before the tanker leasing issue gets fouled up” -- to her ██████████ after he emailed her that his interview with ██████████ “seemed to go very well.”

b7(C)

In his sworn testimony to us, Secretary Roche adamantly denied that his email comment was designed to induce OMB to take favorable action on the tanker lease initiative. He categorized the allegation as “Bizarre. It is utterly bizarre.” When asked whether the job recommendation would have been construed by Ms. Cleveland as a type of “payoff” for supporting the tanker lease, Secretary Roche replied, “Oh, God, no. Please, sir, 25 years [of public service].”

Secretary Roche made several arguments to support that position. First, he stated that Ms. Cleveland “doesn’t have the power” to change the OMB position on the tanker lease initiative. He noted that she “was a staffer. She is not the head of OMB. She is not the head of national security. She’s the third tier person.” Second, he indicated that key issues with OMB regarding the tanker lease initiative had already been resolved at the time he transmitted his email. He testified: “The OMB part was done . . . we are on the same side.”¹² Third, he indicated that the “Give me tankers” comment was “really a tease” -- a manner of conversation

¹² Elsewhere in his testimony, Secretary Roche clarified the nature of any disagreement with OMB as “just price,” since he recalled that a disagreement regarding tanker project consistency with OMB Circular A-11 had been resolved. He stated, “All the issues associated with Circular A-11 are done and all we are doing is trying to hone in on what is the appropriate price.”

that would reasonably be viewed as a typical “Jim [Roche] to Robin [Cleveland] thing.” To illustrate his propensity to “tease” Ms. Cleveland, Secretary Roche provided us a copy of a December 20, 2002, email to Ms. Cleveland, subject: “Merry Christmas!” which began:

Robin, I fell asleep in my chair loo[k]ing at the Christmas Tree and began to dream. In my dream, Santa came down the chimney and left an OMB 767 Lease Approval in my stocking. I was so excited.

In her response to our written questions, Ms. Cleveland stated she had no personal position on the tanker lease proposal. Her responsibility was to represent OMB’s position. She explained that the “differences on this issue were between OMB and the Air Force, not between myself and Secretary Roche.” Regarding Secretary Roche’s comment, “Give me tankers,” Ms. Cleveland stated:

During this period, the proposal for the Air Force to lease Boeing 767 tankers was the number one issue of discussion between OMB and the Air Force and more particularly between Secretary Roche and me. In particular, he frequently expressed to me his desire to get the tanker lease approved. The ‘give me tankers’ comment was, to me, a continuation of that repeatedly expressed desire. I read nothing more into it.

Ms. Cleveland stated she did not recall giving Secretary Roche’s parenthetical comment, “Oops, did I say that?” any consideration when she first read his email. She added

As I reflect on it now, the best interpretation I can offer is that he was pretending to be embarrassed for being so insistent about trying to get the tanker lease approved, and for mentioning it in connection with forwarding my brother's resume.

Ms. Cleveland repeatedly denied that her email exchange with Secretary Roche had any effect on her representation of OMB’s position on the tanker lease proposal. Her responses to various questions on that issue follow:

[T]he ‘give me tankers’ comment had no effect one way or the other on my position--again, OMB’s position, which I was representing--regarding the 767 tanker lease initiative. I had heard that same sentiment from Secretary Roche in a variety of contexts, over a long period of time, prior to the email exchange.

It [the job recommendation for ██████████] had no effect. Both before and after the submission, OMB's concerns remained the same. These concerns were well known within the Administration. The concerns did not change: rather, Boeing and the Air Force ultimately met those concerns, by changing some of the terms of the proposed

b7(C)

transaction, to the point that Administration decision makers were satisfied.

I took no different actions as a result of Secretary Roche's forwarding of my brother's information.

I sensed no quid pro quo meaning underlying Secretary Roche's email. Nor would such a meaning have been reasonable under the circumstances I did not feel any obligation to reconsider my or OMB's position.

Ms. Cleveland was not able to recall "precisely what I meant" when making the comment to her [REDACTED] -- "Great hope it works before the tanker leasing issue gets fouled up" -- in an email dated May 15, 2003. She suggested that her comment reflected a "disappointing meeting" with Secretary Roche concerning the tanker lease held earlier that day. Ms. Cleveland told us that, based on that meeting, "I believed . . . that the tanker lease was not going to go through." However, she denied that "the outcome of the tanker lease would or should affect my [REDACTED] employment prospects."

b7(C)

In response to our questions regarding any potential improper influence resulting from the email exchange between Secretary Roche and Ms. Cleveland, the Assistant Director for Budget Review, OMB, and the Chief of the Budget Concepts Branch, OMB, both denied any knowledge of the email in question or of any untoward actions by Ms. Cleveland regarding the lease proposal.

The Assistant Director for Budget Review stated "Ms. Cleveland fought hard to ensure that the Federal Government got the best deal it could for the tanker lease. She fought for a good deal for the taxpayers throughout the course of OMB's review, and continued to do so to the very end." The Chief of the Budget Concepts Branch stated OMB was responsible to "get the price as low as possible so the Federal Government would have the best possible deal. He added he "worked closely with the National Security Division staff throughout the process, and this focus on the lowest possible price continued throughout the course of OMB's review, including after the time of the email exchange."

Discussion

Our limited investigative work found no evidence that Secretary Roche's employment recommendation caused Ms. Cleveland to modify her position on the 767 tanker lease project or otherwise impacted the OMB position on that project.¹³ As such we find insufficient basis for a determination that Secretary Roche's comment constituted complicity in a possible violation of JER provisions concerning "Misuse of Position" or that comment constituted an attempt to influence others in a manner that was inconsistent with JER guidelines for ethical values.

¹³ As described in the Scope section of this report, we reiterate that our investigative work into this issue was limited by jurisdictional considerations. [REDACTED]

b7(A)

We considered credible the denials by Secretary Roche and Ms. Cleveland that the parenthetical comment, “Give me tankers” had, or was intended to have, an effect on the OMB activity concerning the tanker lease initiative. These and other emails described in this report tend to confirm Secretary Roche’s assertion that he frequently inserted humorous asides or “teasing” comments in emails to associates that were not meant to be taken seriously.

We concur with Ms. Cleveland that Secretary Roche’s request to “Give me tankers” reflected his well-known support of the tanker lease initiative and was not unusual or remarkable. Further, we note that a “disappointing meeting” between OMB and Air Force officials on the tanker lease project occurring on May 15 -- several days after the email exchange -- is not consistent with the suggestion that the email exchange influenced a more favorable OMB position.

Finally, two OMB officials who were in a position to witness unforeseen or unusual changes in Ms. Cleveland’s position at the time did not perceive any change. Accordingly, there is insufficient testimonial basis to pursue the matter as misconduct by Secretary Roche.

V. CONCLUSIONS

A. Secretary Roche used his official title in recommending a private job applicant for favorable consideration in violation of DoD 5500.7-R, “JER,” Section 2635.702, “Use of public office for private gain.”

B. Secretary Roche violated Section 2-301 of the JER, “Use of Federal Government Resources,” by using a Government communications system to transmit the employment recommendation for [REDACTED].

b7(C)

C. Secretary Roche did not improperly withhold records in response to a SASC request for records in violation of DoD Directive 5400.4, “Provision of Information to Congress.”

D. Secretary Roche’s employment recommendation did not improperly influence the OMB assessment of the KC-767 tanker lease initiative.

VI. RECOMMENDATIONS

We make no recommendation for corrective action in view of Secretary Roche’s departure from DoD.